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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNITEDHEALTHCARE BENEFITS OF)
TEXAS, INC., ET AL) CASE NO. 6:24cv357
)
-vs-)
) Tyler, Texas
CENTERS FOR MEDICARE &) 10:02 a.m.
MEDICAID SERVICES, ET AL) November 18, 2024

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(CALL TO ORDER OF THE COURT.)

THE COURT: Thank you. Please be seated.

So we are here about a phone call.

This is Civil Action 6:24cv357, UnitedHealthcare Benefits of Texas vs. Centers for Medicare & Medicaid Services.

Let me take appearances for the record.

MR. JORDAN: Good morning, Your Honor. Bill Jordan from Alston & Bird for UnitedHealthcare.

MR. JARCHO: Dan Jarcho from Alston & Bird for UnitedHealthcare.

MS. WEBER: Erin Weber for UnitedHealthcare.

MS. HILLER: Elinor Hiller also for UnitedHealthcare.

THE COURT: Thank you.

MR. CAMPBELL: Good morning, Your Honor. Matt Campbell for the Government.

THE COURT: Okay. Thank you.

MR. GILLINGHAM: James Gillingham for the Government, as well, Your Honor.

THE COURT: Good morning.

Okay. So let me hear from the Plaintiffs.

MR. JORDAN: Good morning, Your Honor. And, again, Bill Jordan on behalf of UnitedHealthcare. I wanted to start

1 by thanking you for scheduling this on such a rapid basis.

2 As you began when you noted in, we are, in fact,
3 here on a phone call. That this is not a mere trifling
4 matter of a single phone call. It is a phone call that
5 because of the arbitrary and capricious decision by the
6 Government to view that call as unsuccessful instead of
7 invalidated, that that resulted in an unfair and inaccurate
8 depiction of 19 health plans that allow millions of seniors
9 not to get a true and accurate and fair reference point for
10 what the health plans are and their quality.

11 And let me talk a little bit about why that
12 decision is arbitrary and capricious. We are here on an
13 Administrative Procedure Act matter. The Court is sitting as
14 essentially an appellate tribunal on a record.

15 That record shows that the particular call at issue
16 was made. It was dialed, which is Phase 1 of what CMS and
17 their test callers are to do.

18 CMS admits that that test call was connected, which
19 is Phase 2.

20 And then their test caller chose not to proceed, as
21 he was required to do, into Phase 3, which was asking the
22 introductory question to determine whether the person on the
23 other end of the call is able to respond and answer questions
24 appropriately in the language. In this case, the language
25 was French.

1 And that is really the simplest way to describe
2 this, which is CMS admits the call was connected. They say
3 that for a reason, that the caller had a subjective belief
4 that he was still on hold, although the record would belie
5 that.

6 But what the record that is before Your Honor says,
7 that the call connected. CMS admitted that on no fewer than
8 three occasions in the rationale that it would put forward in
9 the record. And then the caller made the decision not to
10 proceed to Phase 3 to ask the introductory questions.

11 And the record is clear on that point, and
12 Your Honor sits, again as the matter -- in the space of the
13 appellate tribunal, to look at what the agency said.

14 And the agency in response in the opposition brief
15 initially, if you look at page 13 and 14 of their brief,
16 suggested that the call did not actually connect, that they
17 didn't pass Phase 2. They essentially tried to create a
18 Phase 2A and Phase 2B, and say somehow that UnitedHealthcare
19 was obligated to say some magic words or otherwise respond.

20 Then faced with the record which showed that on the
21 three occasions when UnitedHealthcare during the plan review
22 process actually appealed and said, no, you need to take a
23 look at this, they said on those three occasions that the
24 call did connect.

25 And the guidance that CMS issues, its own guidance

1 says, once a call is connected, then you proceed to the
2 standpoint of the introductory question. It says, the
3 call -- this is on page 6 of the administrative record.

4 It says: The interpreter availability and LEP
5 measures may have a connected, a complete, and an
6 unsuccessful outcome.

7 And then it says: CMS permits eight minutes for
8 this interaction to occur.

9 It says: The call is considered connected when the
10 caller connects with the CSR.

11 The record and the rationale for the decision that
12 CMS proffered not to invalidate this call says that the call
13 connected, but then there was this belief on the part of the
14 caller that somehow they were still on hold because they
15 didn't hear something on the other end.

16 But the guidance that CMS has says, once you
17 connect, you have to ask that introductory question.

18 THE COURT: If I agree with you on this argument,
19 do I stop there, or do you want me to resolve the other --
20 because you raise three other arguments.

21 MR. JORDAN: If you agree with us on that -- on
22 that point, Your Honor, that is the -- in essence, the open
23 and shut case here, that is, that is that the caller failed
24 to ask --

25 THE COURT: You are asking me to tell the agency to

1 recalculate the ratings, correct?

2 MR. JORDAN: That is correct.

3 THE COURT: What is the basis for that?

4 MR. JORDAN: So when the matter is invalidated, as
5 this should have been under their regulations, the agency
6 would put the call, not in the denominator of calls, which is
7 what we saw with -- let me back up.

8 We actually challenged three different calls, as
9 you saw on the record. The agency invalidated both of those
10 other calls, took them out of the denominator, and that is
11 the process that they utilize when there is a call that
12 simply shouldn't have been counted.

13 And so in this case we would ask --

14 THE COURT: But under the APA, I am only authorized
15 to set aside agency action or to vacate it. I mean, what
16 authority do I have to tell the agency either -- redo the
17 math?

18 MR. JORDAN: Sure. You have the option in this
19 case where there are circumstances where we have been to the
20 agency on no fewer than three times. They don't get a fourth
21 bite at the apple to come up with some different rationale.

22 The BNSF case at 105 F.4th 6 -- I believe 691 at
23 701 says that: Remand is not necessary where the agency
24 decision is a foregone conclusion.

25 And it also said: We do not doom defendants to an

1 endless loop of regulatory activity.

2 In that case the Fifth Circuit said it was fine to
3 send --

4 THE COURT: That is a Fifth Circuit case?

5 MR. JORDAN: Yes, Your Honor. Fifth Circuit case.

6 And it cites, actually, the -- it goes back to even
7 pre-APA cases in that particular case. It is worth a review.
8 Because in that circumstance, the Fifth Circuit said it was
9 entirely appropriate to what they called "remand with
10 direction."

11 And in that case it sent the case back and told the
12 agency that a remand with direction was appropriate. And it
13 looked at other cases.

14 There was a Supreme Court case, Morgan -- Morgan
15 Stanley vs. Public Utility District, 554 U.S. 527. In that
16 case there actually wasn't remand. In that case the court
17 made the determination, it said: Remand is not necessary
18 where the decision is a foregone conclusion.

19 And, here, we know that the decision of the agency
20 is, in fact, a foregone conclusion.

21 Another case --

22 THE COURT: And does the agency dispute you on that
23 point? And which I will obviously ask the agency's lawyer.

24 But is it your view they -- that it is sort of undisputed
25 that if they lose, then the remedy is to tell the agency to

1 recalculate the ratings?

2 MR. JORDAN: I believe so. Obviously, I will have
3 to hear it from my colleague. But I believe that if this
4 call -- if there is a remand with direction or if the Court,
5 which I think it is entirely within the Court's power, makes
6 the determination that invalidation is appropriate and
7 directs the agency to recalculate, that the agency would do
8 that.

9 It would remove the call from the denominator, and
10 that resolves this matter, and the Star Ratings are
11 recalculated then with a 100 percent rate for the -- I
12 believe it will then be 46 calls out of 46 calls instead of
13 46 calls out of 47.

14 THE COURT: Other than the Elevance case, are there
15 any other cases where courts have disagreed with Star Ratings
16 and then told the agency how to fix it.

17 MR. JORDAN: There are --

18 THE COURT: And I know there is, what, four other
19 pending cases --

20 MR. JORDAN: There are a number of cases --

21 THE COURT: -- why is all this happening?

22 MR. JORDAN: Elevance, to my understanding, is the
23 only case that has reached a resolution thus far. I believe
24 this case would be the second, and then there are a number of
25 other Star Ratings cases that are pending.

1 THE COURT: Why is this happening all of the
2 sudden?

3 MR. JORDAN: That's a good question, Your Honor.
4 So the -- I would like to say that these things happen at the
5 margins. You know, if there had been three or four
6 unsuccessful calls for us on this particular -- this
7 particular metric, then, you know, this one marginal call
8 would not have -- so my suspicion is somehow something
9 occurred during this particular review cycle that allowed
10 things to occur on the margin.

11 There are some calculation issues in a case that
12 was called Scan Health related to the calculation of various
13 cut points using specific statistical methodology that was
14 challenged in the DC District Court, and those cut points
15 were then rejected.

16 I believe my colleague may have even been involved
17 in that, and he can probably answer that in much more detail
18 than I can. Judge Nichols had that case in the DC District
19 Court.

20 And so, you know, it also is the case that because
21 of the way the Star Ratings for this particular metric are
22 calculated, it is not just one call affecting a single health
23 plan. We are here because of UnitedHealthcare Benefits of
24 Texas. But because the Call Center actually applies for
25 multiple plans, 19 or 20 health plans had their Star Rating

1 impacted by a half point as a result of this.

2 THE COURT: I know you didn't make this argument,
3 but why isn't it just kind of common sense arbitrary and
4 capricious to -- for the agency to lower the Star Ratings so
5 significantly based on a single call when 70 calls were
6 evaluated?

7 I mean -- again, I keep going back to why are you
8 in federal court for this? This is one call. This is crazy.

9 MR. JORDAN: I do look at that and will have to ask
10 my friends on the policy side that question as to why, you
11 know, 100 percent is the metric, as opposed to recognizing in
12 an ordinary course there could be some various issues.

13 All I know is the way that they established the
14 metric, you are at 100 percent or your Star Rating gets
15 lowered.

16 THE COURT: 25 percent basically. That's on a
17 single call?

18 MR. JORDAN: That's correct.

19 THE COURT: And why is there not a better agency
20 appellate process to resolve these kinds of what I view as
21 really silly disputes?

22 MR. JORDAN: Yeah, so the plan review process does
23 set it up obviously where we can on a fairly informal basis
24 go to the Call Center review people. And you saw from the
25 back-and-forth that it really is a relatively informal

1 process without some third party taking a look to adjudicate
2 it before it goes -- you know, or an ALJ -- ALJ process.

3 Again, I didn't set this up. I wish it were a
4 different process --

5 THE COURT: I am not faulting you --

6 MR. JORDAN: It does feel like one where --

7 THE COURT: -- I'm just --

8 MR. JORDAN: I am sorry, Your Honor. I didn't mean
9 to interrupt.

10 THE COURT: Let me ask you about your second
11 argument. You cite the Elevance case and say the way that
12 call was treated means that they treated you differently and,
13 therefore, it is arbitrary and capricious.

14 But isn't the call in that case different, in that
15 your argument is your call connected and that call did not
16 connect?

17 MR. JORDAN: And we cite cases in response to my
18 colleague's arguments showing that, you know, it doesn't
19 require an exact one-to-one for there to be a mismatch in the
20 way that parties are treated.

21 Here, in the Elevance case, as nearly as we can
22 tell from that record, there were audio and quality issues --
23 audio quality issues that weren't determined to be
24 immediately the fault of the agency or the fault of the
25 called party.

1 And that is, in essence, what we have here. We
2 have parties talking across one another. One saying, no,
3 this was your fault; the other saying, no, it was the other
4 fault.

5 What we do know is that from the record we
6 submitted, that our caller, our French interpreter, has in
7 the record -- this is in the record at page 2 --

8 THE COURT: This is his notes.

9 MR. JORDAN: This is our -- our record at page 239,
10 which would be embedded files for what we saw on our end,
11 which is that the call connected, was transferred to a
12 French-speaking agent, and our French-speaking agents noted
13 no contact made, no answer on the other side. And we said,
14 look --

15 THE COURT: So your caller or your agent didn't
16 hear the "hello"?

17 MR. JORDAN: He reports he did not hear the
18 "hello."

19 THE COURT: Okay.

20 MR. JORDAN: And so, again, we look at that and say
21 once you treat like cases in a like manner -- in the Elevance
22 case, there were simply, in essence, competing views about
23 the audio quality. And the agency said, you know, what, in
24 this case, we are going to invalidate that call, as they
25 should here.

1 And that is the best way to frame our argument,
2 that where you have got the agency -- the agency and the
3 called entity both having records that are at best ambiguous,
4 that that is what happened in the Elevance case given the
5 audio quality there.

6 You don't really look at fault one way or the
7 other. You say, you know what, we actually are trying to
8 test for the nature that a calling person would have. And
9 this call should be invalidated because there was something
10 going on, and the record back and forth would say there was
11 something going on here that means that that is a call, just
12 like in the Elevance case, that shouldn't be counted.

13 THE COURT: Do you want to address your third
14 argument about the agency failing to adequately address your
15 major argument?

16 MR. JORDAN: Our third argument, we would -- we
17 think that we would -- our best argument is our first.

18 Our third argument I would look at and say it does
19 appear from the record that there was substantial deference
20 being paid and not independent judgment being exercised by
21 the agency.

22 But I will admit to Your Honor that if you were on
23 the third -- third element, that remand for consideration of
24 that issue is going to be an appropriate remedy for the
25 agency in that particular circumstance.

1 This is -- this is one we think that we are right
2 on that -- on that matter, but they failed to address our
3 argument on that in the record.

4 But that is one where if we end up having to
5 preserve this for appeal, that is one that we will end of
6 having to take up on appeal.

7 THE COURT: Okay. And then I want to ask you about
8 your fourth point, the delegation argument.

9 First of all, is there a statute that authorizes
10 CMS to use private parties in administrating the program in
11 this way, that you are aware of?

12 MR. JORDAN: I am not sure that the statute
13 expressly authorizes a delegation. I would need to go and
14 look and see whether it mentions that expressly.

15 It would certainly authorize CMS to establish
16 procedures to conduct the star ranking program. But I do not
17 believe, although I will -- I do not believe that it
18 expressly talks about that delegation to a third party.

19 THE COURT: Okay. Well, why don't you go ahead and
20 address that argument. What is your point on that?

21 MR. JORDAN: Our point on that is that CMS must, in
22 fact, make a decision, that it cannot outsource a decision to
23 a third party and give all discretion to that third party.

24 And what we saw in the record was a question that
25 went to the third party, the third party made a

1 determination, and at least on the record that is before us,
2 CMS said -- didn't say we agree -- we disagree, they simply
3 repeat the rationale of that third party. And CMS has to
4 make an independent determination.

5 THE COURT: And is that an arbitrary and capricious
6 point, or is that an unlawful agency action?

7 MR. JORDAN: That is an unlawful agency action
8 point.

9 THE COURT: Okay. And did you -- does it matter --
10 as I read your complaint, it was limited to arbitrary and
11 capricious agency action.

12 Is that a problem?

13 MR. JORDAN: I do not believe that that is a
14 problem from the standpoint of the Court's ability to look at
15 the statutory and appropriate basis for the agency to conduct
16 its review.

17 Just one moment though.

18 THE COURT: Okay.

19 (Pause in proceedings.)

20 MR. JORDAN: Our arbitrary and capricious point on
21 that, Your Honor, is that it is arbitrary and capricious to
22 make a clear error of judgment on that point. That is not --
23 that is delegating that -- that discretion to the third
24 party. And that delegating that discretion to the third
25 party was -- who made a clear error of judgment, in essence,

1 circles back to make that an arbitrary and capricious
2 determination.

3 THE COURT: What is your best case on that point?

4 MR. JORDAN: Give me one more moment.

5 (Pause in proceedings.)

6 MR. JORDAN: I am not sure I have a specific case
7 to cite other than a general principle of administrative law.

8 THE COURT: Okay. Are there other tasks that CMS
9 uses in which they use a private contractor to perform these
10 kinds of -- these kinds of tests?

11 MR. JORDAN: There are any number of situations
12 where CMS uses private third-party contractors in connection
13 with reviews of any various types of CMS actions.

14 THE COURT: For more than ministerial tasks.

15 MR. JORDAN: For more than ministerial tasks, that
16 is correct. It would be, you know, everything from
17 examining, you know, of quality of medical records, to, you
18 know, other types of experience that health plans have to
19 mark -- you know -- but there are things --

20 THE COURT: So what would be the consequences if I
21 agree with you on this argument and say that it was unlawful
22 or arbitrary and capricious for the agency to delegate this
23 kind of authority to a private party?

24 MR. JORDAN: In this circumstance, what we were
25 saying is that the third party was exercising its discretion

1 in a manner that CMS was not appropriately monitoring. And,
2 that is, where the agency is simply, for lack of a better
3 term, rubber-stamping the third party's actions without
4 conducting its own reviews, what you saw in the plan review
5 process, that that is what is impermissible.

6 You can certainly create a framework where there
7 are third parties that are contracted to the Government to
8 conduct actions, but the agency has to exercise more
9 oversight over those third parties than they did here.

10 THE COURT: So my question is, how disruptive would
11 an order from a district court finding that kind of
12 delegation to be unlawful, be in the CMS world?

13 MR. JORDAN: We are not asking for all delegations
14 to cease. We are just saying --

15 THE COURT: Well, I understand, but --

16 MR. JORDAN: So I do not believe that it should be
17 disruptive. I would think in the ordinary course CMS should
18 have been exercising oversight over these third parties.

19 THE COURT: Okay.

20 Okay. Anything further?

21 MR. JORDAN: I do not. Let me check with my
22 colleagues and make sure, Your Honor, before I say that.

23 All right. Nothing further right now, Your Honor.
24 Thank you.

25 THE COURT: We are setting up a conference line.

1 We have made it available for people who were interested in
2 hearing -- listening in to the hearing. Apparently we didn't
3 do that before we got started, so we are setting up now.

4 (Pause in proceedings.)

5 THE COURT: Okay. If you will just wait until we
6 get the call set up.

7 (Pause in proceedings - technical difficulties.)

8 THE COURT: We tried, let the record reflect.

9 Okay. Let me hear from the Government.

10 MR. CAMPBELL: Good morning, Your Honor. This is
11 Matt Campbell, again, on behalf of the Government.

12 I would like to address a few brief words to the
13 Start Rating System itself and this performance measure
14 because -- I don't want to be forward, but I detected some
15 potential skepticism in how this is done, but I think it is
16 important to understand the background of the Star Rating
17 System.

18 THE COURT: Okay.

19 MR. CAMPBELL: So CMS developed this Star Rating
20 System at Congress's direction to provide Medicare
21 beneficiaries with reliable information about the quality of
22 these plans and to help them choose among the plans.

23 Later, Congress expanded the burden of this Star
24 Rating System by essentially trying to incentivize Medicare
25 beneficiaries to choose, based on the plan, to go to

1 higher -- higher rated programs because the idea would be
2 higher rated programs are delivering higher or better health
3 outcomes to try to reduce burden -- the budgetary burden.

4 The Star Rating System that was developed is an
5 objective process that measures performance on four dozen
6 different measures -- three dozen different measures
7 depending on what type of plan there is.

8 And it measures health outcomes of each plan
9 relative to every single other plan that exists. It is
10 grading on a curve.

11 To make these comparisons, CMS has to collect and
12 analyze millions of data points from multiple different
13 sources, including health records, survey data, all different
14 types of measures that the agency is performing from the
15 millions of beneficiaries that are covered.

16 CMS has to do this every single year to do this.
17 They have to -- in October, Congress directs that they have
18 to publish these Star Ratings, and then by June there has to
19 be bids -- of the next year there have to be bids that
20 incorporate these Star Ratings in various quality bonus
21 payments, which aren't really at issue in the litigation.

22 The Court asked a question about the appeal
23 process. The timing is not of CMS's decisions. CMS has to
24 do this by October, and then has to publish the -- has to
25 issue these, collect all of the data, craft the Star Ratings.

1 The Star Ratings are crafted based on every single
2 plan's data, so they have to grade on the curve, and then
3 have to publish it and repeat this every single year.

4 Again, the Star Ratings grade on a curve. For most
5 of these measures the way it works, including the measure at
6 issue here, we get raw score first. Right? You have some
7 measure. Often it is what percentage of the time do you meet
8 a particular standard? That is the situation here.

9 Then that raw score gets converted to a grade. And
10 this is required by Congress to have a 1 through 5 star
11 grading system.

12 It gets converted, not by random arbitrary choice
13 by the agency, but by a statistical process that is in the
14 regulations called a clustering methodology.

15 I wouldn't be able to explain exactly how the
16 methodology works to the Court if you asked, but essentially
17 it is a methodology that tries as fairly as possible to see
18 where there are natural cuts in the data so that you don't
19 have, for instance, one plan having a score that is right
20 here and one right next to it and they get a widely divergent
21 score.

22 So the statistical clustering methodology which
23 appears in the regulation is specifically designed to try to
24 address that issue.

25 Then all of the measures for 30 some-odd scores are

1 then folded together and weighted into an average score, and
2 that score becomes the overall score for each one of these
3 health plans.

4 Obviously, when you have 500 different plans, there
5 are going to be edge cases every single year depending on --
6 where if I get one score higher, I would move up.

7 Your Honor, I am unfortunately a University of
8 Florida fan, and I can tell you if one play changed, we would
9 be, you know, a lot better off. But it is not how each
10 play -- it is not one play but how you play over a season
11 that gives your score.

12 And that is exactly what happens here. The foreign
13 language measure is precisely this. It is just one of dozens
14 of measures. It measures an important issue, which is
15 whether limited English proficiency beneficiaries or
16 beneficiaries with hearing disabilities or speech
17 disabilities can actually access plans and get information
18 they need for the plan.

19 This data is measured annually through a survey
20 that CMS doesn't conduct itself. CMS hires someone, a
21 contractor to conduct these survey calls. There are a lot of
22 calls, 60 calls. There are 500-plus plans, and they do 60
23 calls, and they have to do it each spring to be able to turn
24 this around.

25 These calls are done anonymously to each plan's

1 health center. The raw score is a clearly laid out -- it is
2 a percentage of the time a call gets completed over the times
3 that you attempt. So that is the statistic that is in the
4 guidance, completed calls over the number of attempted calls.

5 A completed call is clearly defined in the
6 guidelines as a call where the caller, the test caller
7 establishes contact with an interpreter and confirms that
8 that customer service representative can answer the question
9 about the plan. That is at AR-10.

10 And for the 2025 Star Ratings, a large number of
11 plans, over a hundred, got a hundred percent on this measure.
12 And because of the operation of the statistical clustering
13 methodology, for that reason anybody who got a 100 percent,
14 got a 5 star.

15 And if you didn't, if you missed one call, for
16 example in the case of Plaintiffs, you got a 4 star, not a 1
17 star, a 4 star. You got one lower.

18 And that is just purely a mathematical function of
19 the number of health plans that were able to achieve a 100
20 percent score.

21 So what happened here at issue? Plaintiffs
22 challenge just one of four dozen calls that the agency --

23 THE COURT: Well, before we get to this specific
24 call -- and you do concede it comes down to one call, right?

25 MR. CAMPBELL: Your Honor, we concede that this

1 comes down to one call in the sense that every single score
2 that UH -- that UnitedHealth got made a difference because
3 they are right on the line.

4 So if they were here saying we just got this score
5 on this measure of a health outcome, we would go up. If we
6 just got this score. Because they happened to be right on
7 the line.

8 So, yes, it is true that this call made the
9 difference, but there are plenty of others reasons why.

10 It is the example I used of the University of
11 Florida football game, one play could arguably make a
12 difference. But it is really the collection of all of the
13 different data points that make the difference. It just so
14 happens that the call is the one that they chose to challenge
15 here.

16 THE COURT: And then I have a series of questions
17 that you have already heard me ask. Why are all these cases
18 being filed in federal court now based on people complaining
19 about the Star Rating System? Is this new? Why is this
20 happening now? And, other than the Elevance case, are courts
21 disagreeing with the agency on how to evaluate plans?

22 MR. CAMPBELL: The only call -- the only decisions
23 that have actually been decided, Your Honor, are two
24 decisions out of DC District Court, one called Scan Health
25 and one called Elevance Health.

1 They were decided in June of last year. I argued
2 those cases. I am very familiar with those cases. Those
3 cases had to do with a -- not a challenge to the Star
4 Ratings, the arbitrary and capricious nature of the Star
5 Ratings, it wasn't challenged. The challenge specifically in
6 that case was one methodology that the agency wanted to use,
7 a change in their regulations the agency wanted to use.

8 The agency wanted to -- it is called the two-key
9 outlier methodology. It is a statistical methodology that I
10 had to learn about. But it is essentially a methodology for
11 how you take outlier data and get rid of certain outlier data
12 that skews the results. Because health plans were concerned
13 that an outlier that was too high or too low was skewing the
14 results, so the agency adopted this outlier.

15 And it was strictly a procedural issue about how
16 that change fit with another guardrail requirement that is in
17 the regulations. And the problem there for the agency, that
18 the Court concluded, was the manner in which you were to fit
19 those two sentences that literally appeared next to each
20 other for the two-key methodology. The manner in which the
21 agency said they were going to do it appeared only in the
22 preamble, not in the regulations.

23 And so the Court concluded that we only look at the
24 two sentences as they read in the regs, and based on that, we
25 are going to apply this methodology a particular way.

1 It had nothing to do with whether or not the Star
2 Ratings actually were inappropriate or arbitrary and
3 capricious or anything like that. It was just literally how
4 the agency's methodology was going to work to actually
5 implement the Star Ratings methodology.

6 Those are the only two cases, and they were
7 essentially identical cases brought by two different health
8 plans that have been decided.

9 There is an Elevance administrative issue that they
10 bring up here. But that was resolved by the administrative
11 agency.

12 CMS does have an administrative review process that
13 they have built in for these calls. But, unfortunately, the
14 timing is only related to the quality bonus payment issue.
15 Right? And the reason, as I understand it that
16 UnitedHealthcare is here, is because the ratings have already
17 been published.

18 There may be time to go through that process to the
19 extent it affects their quality bonus payments for future
20 years, but the ratings for purposes of Medicare beneficiaries
21 making decisions are already out should they chose to
22 bring -- to come to federal court before taking advantage of
23 that process.

24 In Elevance and Scan, they didn't. And so for that
25 reason Elevance had an administrative appeal in which the --

1 the call at issue there was invalidated by the hearing
2 officer, and so the court never addressed the call issue at
3 all.

4 In terms of why Plaintiffs are now bringing cases,
5 I have my suspicions about --

6 THE COURT: What are they?

7 MR. CAMPBELL: My suspicions are the fact that for
8 the first time someone challenged it successfully, and these
9 things make a tremendous amount of money to the health plans,
10 hundreds of millions of dollars. Right? But Congress chose
11 to do that.

12 THE COURT: But before 2024 when all of them
13 started challenging the Star Ratings, what happened? They
14 just -- they lived with the Star Ratings, or were they able
15 to get the agency to back off a little bit? That is what I
16 am trying to understand.

17 MR. CAMPBELL: The agency has always gone through
18 the process of hearing the plans out, and looking at it and
19 comparing and making decisions.

20 Even in this case the agency got an appeal from
21 these particular Plaintiffs and agreed on two of the three
22 calls. Right? They went through their process and they
23 looked at it and they heard the evidence and they made a
24 decision based on it.

25 The agency has not been unwilling to consider any

1 challenges to these calls. There just is a point where the
2 agency can't say -- can't say that they can change the scores
3 or invalidate calls that they think under the scenario --
4 this is precisely what the call is trying to test --
5 precisely what it is trying to test. Right?

6 At some point the measure has no value if every
7 call that gets challenged has to be invalidated. Right? And
8 so the agency has to consider, is this the type of thing we
9 are trying to encourage plans not to do when Medicare
10 beneficiaries come?

11 And I would submit, if I could, turn back to what
12 happens here, this is the precise thing that any Medicare
13 beneficiary who called up and had this experience would not
14 like this experience. This is not a positive experience.

15 All of us have experiences calling call centers.
16 And what happened here is the caller, the test caller dialed
17 the proper number, got an automated menu that said, in
18 French, if you want to continue the call in French, press 6.

19 He pressed 6. He listened for a brief period. No
20 sound. And then there is a recording, Your Honor, that we
21 have provided to Your Honor's chambers --

22 THE COURT: I have heard it.

23 MR. CAMPBELL: Right. Where all you hear is a "fu"
24 and then it goes away. That is the only thing we hear from
25 the customer service representative at UnitedHealthcare, at

1 the Plaintiffs' Call Center.

2 The test caller didn't just sit on their hands.
3 They said "hello" to try to see if anyone was there, and
4 there was no sound at all.

5 And if I could clarify one point that Plaintiffs'
6 counsel mentioned, I think it is clear in the record, frankly
7 in the very first submission that they had, that Plaintiffs
8 had, that their caller, their customer service
9 representative, could hear the "hello."

10 The Call Center's recording, the recording we have
11 is of the Call Center's side, we know our person could be
12 heard by the Call Center. The problem is our person couldn't
13 hear their customer service representative, and their own
14 Call Center could not hear their customer service
15 representative. That is the critical distinction here.

16 This was clearly a problem on the customer
17 service's end -- customer service -- customer service
18 representative's end because their own system could hear us.
19 They couldn't hear their own person.

20 And for that reason, that is one where there is a
21 clear fault that the agency can determine in the call. It is
22 clearly something that is not a completed call. Right? The
23 way I would analyze it is this: The measure is what
24 percentage of completed calls over attempted calls. There is
25 no dispute that this wasn't a completed call.

1 THE COURT: Well, but, I mean, the problem for you
2 is that you have got these guidelines that set out what the
3 plans are supposed to do to make sure they stay within the
4 good graces of the agency. And if the agency evaluates them
5 in a way that is contrary to those guidelines, obviously,
6 that is a problem. That is arbitrary and capricious, as I
7 understand.

8 And, here, I mean, I have read the guidelines,
9 which I will admit are not a model of clarity, it seems to me
10 that there is this three- or four-part -- three- or four-step
11 process that they are supposed to comply with. The agency
12 has admitted multiple times that the call connected, and then
13 there was no question asked. And so, therefore, how could
14 you say it is an unsuccessful call?

15 MR. CAMPBELL: I will address each of those points,
16 if I could?

17 THE COURT: Okay.

18 MR. CAMPBELL: Okay. Firstly, there is not a
19 statement in the guidelines that says under the
20 circumstances, the call has to be invalidated.

21 So the guidelines don't say that, and let me say
22 how I get there because I think it is important. The way
23 this works is, it not a completed call. No question it is a
24 completed call.

25 So what they have to establish is the call should

1 be invalidated. And they have to say that in the guidelines
2 this is a circumstance in which the call should be
3 invalidated. If you look at the guidelines and run a
4 search -- I did it for -- I'm sorry, Your Honor.

5 If one runs a search in the guidelines for
6 "invalidated," you see it come up twice. One of those times
7 is if you call the wrong number. Another time is if you call
8 outside the 8:00 to 8:00 p.m. -- 8:00 a.m. to 8:00 p.m.
9 window.

10 And so in that situation, that is the only time in
11 which the guidelines talk about a scenario in which they
12 would specifically invalidate it.

13 Now, what their claim is, is that the test caller
14 didn't follow its own protocol. So I could understand an
15 argument whereby there is not an express criteria for
16 invalidating under the circumstance, but if the test caller
17 didn't follow his own protocols, then that might be a
18 scenario in which a call ought to be invalidated.

19 The problem that I would submit for that argument
20 is that they followed the protocol. The protocol is -- if
21 you read the protocol, and particularly I do have to say I
22 understand the Court's concern about the comments -- or,
23 excuse me, the guidelines not being that clear, but if you
24 read them, there are three types of calls being addressed
25 there.

1 One is a native English call. One is a foreign
2 language call, like ours. And one is a TTY call. So what
3 you have to be careful about, which I think is clear to the
4 plans, is what we are talking about when we talk about a
5 foreign language call.

6 A foreign language call, the description in the
7 guidelines says a foreign language call has -- and I will
8 have the quote here for Your Honor.

9 If we are testing -- this is on AR6: If we are
10 testing interpreter availability, we place the call in a
11 foreign language and wait for the CSR to bring an interpreter
12 to the phone to assist the CSR in answering our introductory
13 question.

14 The way this works is that when the CSR joins --
15 excuse me, the customer service representative of the health
16 plan joins the call, the test caller is supposed to say,
17 English -- or no English, French, indicate in some sense that
18 they need an interpreter. That is all they are supposed to
19 do.

20 At that point in time, then the customer service
21 representative is supposed to bring an interpreter on the
22 call, or if the customer service representative is bilingual,
23 indicate they can speak French. And then at that time, that
24 is when the test caller asks the question. And the test
25 caller asks the question when they know there is a person on

1 the line.

2 Now, I think that it is the fundamental problem
3 with the call is that there was never a time in which the
4 test caller believed that there was anybody on the other line
5 that they could speak to.

6 And it is clear from the guidelines that the point
7 of the test call is for the test caller to confirm they can
8 communicate with the Call Center system in the foreign
9 language. And if there is no one there to speak to, they
10 obviously can't advance that call or end up getting to a
11 completed call scenario.

12 I would submit that the guidelines themselves do
13 not say this -- in fact, the guidelines actually consider
14 this very scenario. It would be -- under their theory, it
15 would be that as soon as a call is connected, the CSR could
16 hang up.

17 And if we didn't just say into the dark, into the
18 silence the question, then the call would have to be
19 invalidated.

20 If, for example, the CSR, the customer service
21 representative, picked up the call and said, hello, can you
22 hold, and then never came back on the line, their argument
23 would be the test caller had to say the question or the call
24 would have to be invalidated.

25 And I would submit the two examples that I gave

1 Your Honor are examples that are actually in the guidelines
2 for when there would be an unsuccessful call, scenarios in
3 which the call gets cut off or you get placed on hold and
4 can't complete the call.

5 I think this is very clear in the call. I think it
6 is very clear that the agency understood that the test caller
7 believed he was on hold. The record that I think
8 particularly we lay out in our brief in the reply on the call
9 log it shows very clearly why the test caller believed they
10 were on hold.

11 The Plaintiffs have not suggested that that belief
12 was unreasonable in any way. And for that reason, the test
13 caller did not ask the call. They did not sit there -- they
14 did not sit there in this call and choose not to ask the
15 question. They didn't believe there was anybody there to ask
16 the question. And when you look at what the question is, it
17 makes no sense to ask the question --

18 THE COURT: I don't -- I don't dispute that any
19 average person listening to this would say this isn't how
20 this is supposed to work.

21 The problem for you is that you are grading these
22 plans based on written criteria or written procedures. And
23 if you grade them in a way that is contrary to those
24 procedures, those guidelines, then that is arbitrary and
25 capricious.

1 And if you don't have in your guidelines, the way I
2 see it, a very clear process for what happens in this
3 particular scenario, then how can you downgrade the plans for
4 failing to satisfy it?

5 MR. CAMPBELL: So I think that is -- I think -- if
6 I may, a very perceptive question. Plaintiffs didn't really
7 argue that, but it was something that was troubling me,
8 Your Honor, honestly.

9 And here is how I understand it. It is very clear
10 whether a call is completed. Right? The actual question,
11 the actual formula for calculating the raw score, you can
12 see, Your Honor, I believe it is on AR10, says what the
13 formula is, and it is --

14 THE COURT: I don't think they are arguing that the
15 agency should have rated the call as successful. Their
16 argument is that the agency erred in rating it as
17 unsuccessful, and that is because the agency is grading them,
18 as I understand it, according to a measure that is not
19 written down in the guidelines anywhere.

20 MR. CAMPBELL: So I know where you are going with
21 this. If I could answer that. It takes a few steps, if I
22 could, Your Honor?

23 THE COURT: Okay.

24 MR. CAMPBELL: Because I am going to get to that
25 point.

1 The formula measures attempted calls over completed
2 calls. It is clear that this wasn't a completed call. It
3 was an attempted call. The only way we go further is if they
4 can say this meets criteria for invalidation. Right?

5 Because we clearly set out the criteria for when a
6 call is completed, and they don't meet it. That is -- if you
7 are concerned about the agency making it clear to what -- to
8 the plans what they need to do, we made it very clear what a
9 completed call is, and that is the actual measure.

10 What they are trying to say is this is a special
11 circumstance. It needs to be invalidated, right? So they
12 have --

13 THE COURT: Well, or -- that may be their argument.
14 But I would say not necessarily that it needs to be
15 invalidated but that it should not be marked as
16 unsuccessful.

17 MR. CAMPBELL: Right --

18 THE COURT: And, therefore, weighed against the
19 rating.

20 MR. CAMPBELL: Right. The way I would say it is,
21 but if you define when a call is successful, you have defined
22 also when it is unsuccessful. I mean, that is the core to
23 this. We define --

24 THE COURT: But there are scenarios where the
25 agency does not treat calls as either successful or

1 unsuccessful.

2 MR. CAMPBELL: There are --

3 THE COURT: And in some instances it is not just
4 when -- I mean, they invalidate the calls, that is the word
5 the agency uses, but there are examples where calls have been
6 invalidated in scenarios that the guidelines didn't
7 contemplate calls should be invalidated.

8 So there is this gray area of non-successful,
9 non-unsuccessful calls. Why isn't this call in that area?

10 MR. CAMPBELL: So that brings up the Elevance
11 issue. So if I could put a bow on the first issue, and that
12 is, the guidelines do specifically say when calls can be
13 invalidated. This is not those circumstances. It provides
14 two examples.

15 They want to say this also should be invalidated
16 for another reason. That reason is not in the guidelines.
17 It is from administrative practice. That is valid. But that
18 is a situation in the Elevance administrative appeal and,
19 frankly, in an appeal where we invalidated one of their own
20 calls.

21 And that is a situation because the agency is
22 trying to get to true performance. The agency will say, if
23 there is evidence in a particular case where we can't
24 establish where the fault lies between the test caller and
25 the Call Center, in those situations we will invalidate a

1 call.

2 But that is a narrow situation, and we would submit
3 it doesn't apply here. There is nothing that the test caller
4 did wrong in this situation.

5 There is nothing that the test caller did wrong
6 under the process laid out in the guidelines and -- or the
7 training manual that we submit.

8 And so in this situation, the test caller followed
9 the proper procedure. It is clear, as Your Honor I think
10 suggested, that there was clearly fault -- there was clearly
11 a problem on the Call Center side.

12 They have not identified a problem on the test
13 caller side, so that narrow exception that has been
14 recognized in practice by the agency doesn't apply.

15 Because the agency has two specific exceptions
16 where it will invalidate in the guidelines and through
17 practice has recognized another exception, doesn't mean that
18 that means there can be no calls that can be considered not
19 complete. Right? That would have to be logic because it
20 doesn't fit any of the three scenarios that I just talked
21 about in terms of why a call ought to be invalidated. And if
22 it doesn't, the guidelines don't require the call to be
23 invalidated.

24 THE COURT: Do you dispute that the call connected?

25 MR. CAMPBELL: We do not dispute that the call

1 connected. But I think it's -- Plaintiffs' brief claimed
2 that that was our position. We never claimed that position.
3 In fact, they cited three times what they considered
4 concessions.

5 We quoted those in full in our brief. Our position
6 is that the call connected for a split second. That is clear
7 in everything that was said in those statements. It is clear
8 from the call log that was created. It is clear from the
9 audio. There is just no question that it connected but for a
10 split second.

11 And that makes all of the difference. Because if
12 it is no longer connected, how can they possibly ask the
13 question? How would the health plan possibly believe --

14 THE COURT: So your position is it connected for a
15 split second and then disconnected?

16 MR. CAMPBELL: Our position is that it connected
17 for a split second, and then the test caller believed he was
18 on hold. He said "hello" --

19 THE COURT: Is that a position that the agency took
20 before coming to court?

21 MR. CAMPBELL: Absolutely.

22 THE COURT: Okay.

23 MR. CAMPBELL: Absolutely. Your Honor, if you look
24 at each one -- there are three substantive responses that we
25 had, and if you look at each one of those, I think it is very

1 clear that they say that the test caller connected for a
2 split second. At least in one of them, they say a split
3 second. And I think in at least two of them, they said the
4 caller believed they were on hold.

5 So this is not a change at all. Contrary to what
6 Plaintiffs have represented, this is not at all a change. It
7 is precisely what -- the position the agency took in the
8 course of the administrative appeal.

9 THE COURT: Okay.

10 Anything else you want to make -- any other
11 argument you want to make on that first point?

12 MR. CAMPBELL: No, Your Honor. Just purely on the
13 question of whether or not this is contrary to the agency's
14 guidance.

15 THE COURT: Okay. Then I want to ask you about the
16 delegation issue. Is there a statute authorizing CMS to
17 delegate this kind of activity to a private party?

18 MR. CAMPBELL: Your Honor, I don't believe there
19 is. But, honestly, it is not something that we have asked
20 because it wasn't a question raised by Plaintiffs.

21 Plaintiffs -- there are three scenarios in which a
22 delegation has been considered -- or, excuse me, the question
23 is, here, whether or not a delegation is proper as a
24 delegation to a third party for collecting information or
25 providing an agency.

1 So I don't believe there is. But, Your Honor, I
2 can -- I will just say right now I don't believe there is.

3 THE COURT: Okay.

4 MR. CAMPBELL: Okay.

5 THE COURT: And then -- I mean, my read of the
6 Consumers' Research case, this is the Fifth Circuit's en banc
7 decision this year, is that when there is not a statute
8 authorizing that kind of delegation, then federal agencies
9 shouldn't do it unless it is just ministerial -- a
10 ministerial task.

11 Is it your position that this is not -- that this
12 is just a ministerial task?

13 MR. CAMPBELL: Well, this was a -- is -- I would --
14 yes, I would take that position for this reason: Because
15 what the agency asked the third-party contractor to do was
16 literally to conduct a survey, to collect information for
17 this. Right?

18 The agency asked the -- so just to be clear what
19 the third-party contractor's role here is, it is instead of
20 having CMS employees conduct calls that take an exceedingly
21 large amount of time -- I mean, this is -- if you notice in
22 this call, the Call Center -- or the test caller sat on the
23 line for nine minutes because that is what you have to do to
24 give the plans as much possible time -- as time as possible.

25 That's 10 minutes and they can go longer. 60 calls

1 times 500. It is an extraordinary amount of work, and what
2 the agency did is they hired a contractor to just conduct the
3 survey under protocols that the agency set forth -- with and
4 agreed to.

5 And the role that the contractor plays in this
6 situation, I would submit, when you look at it, is literally
7 just one of fact-finding. Right? They conduct the survey,
8 collect the data and information. And then what happens is,
9 in this scenario, what is being disputed or going back and
10 forth between CMS and the contractor is, is the Plaintiffs'
11 claim about the facts true?

12 Well, the contractor conducted the call. So they
13 would be the one to ask, what happened? In terms of a
14 recommendation, though, I think that is different. I don't
15 think it is clear -- I think it is clear that CMS made its
16 own decision on the determination about once we have those
17 facts, what do we do with those facts under the guidelines?

18 THE COURT: Okay. And what would you cite in the
19 record for that point?

20 MR. CAMPBELL: For the last point? Well, for what
21 happened in terms of the role the contractor played, I would
22 say the three -- the -- the three -- I'm sorry, I can get it,
23 Your Honor. It is in the AR.

24 It is immediately following each one of the
25 Plaintiff's emails where they ask for -- they ask us to

1 reconsider this. There is a response in the AR, and I wish I
2 had it immediately at hand --

3 THE COURT: This is where the agency kind of cut
4 and pastes the recommendation from the private entity, the
5 contractor?

6 MR. CAMPBELL: I wouldn't agree exactly with that
7 characterization. But I think what they did is they cut and
8 paste the part of the facts because the facts are the facts.
9 Because the test caller documents -- is required to document
10 essentially minute by minute what occurs.

11 And so when there is a dispute about what happens,
12 you obviously go to the test caller who conducted this. And
13 the agency didn't try to play with the recollection of the
14 test caller who played it. That is the portion that the
15 agency cuts verbatim.

16 But the agency also layers in its own
17 interpretation of what happens after that. I will concede
18 this is not a robust administrative process because the
19 review has to take place so fast. It is an informal process
20 that they themselves have participated in because we have to
21 get the results and post by October for 500 reports. So it
22 has necessarily been set up as an email process so as not to
23 slow this review down to get it completed as fast as
24 possible.

25 So this, by virtue of the schedule, can't be your

1 ordinary adjudication where a hearing officer can write a
2 30-page decision on it. It just isn't enough time. I don't
3 believe that the plans would like us to engage in that
4 process because the results would be posted for months before
5 we could actually get a decision out to them.

6 THE COURT: Okay. Let's talk about remedy. What
7 is your position on remedy, assuming you lose on one of these
8 arguments?

9 MR. CAMPBELL: Okay. So on the first
10 argument -- so the agency I think has been very quick in
11 implementing this. So if the decision by the Court is that
12 the guidelines -- this is contrary to the guidelines. If
13 that was the Court's decision, then in that scenario, I
14 believe a decision saying remanding and recalculating
15 consistent with this would just need -- needs to be remanded,
16 but the agency would act very quickly, right, to be able to
17 reset it.

18 There are -- I will say, Your Honor, there are
19 incentives for us to get the scores right and get them what
20 they are going to be, what the Court says they are going to
21 be because we have to move forward, too. Right?

22 And if the agency was to say this is -- or if the
23 Court, excuse me, was to say this is like Elevance, in that
24 situation I believe a similar thing would obtain.

25 The Court would issue the order saying that this

1 was disparate treatment, and so you have to issue scores --
2 you have to invalidate the score -- excuse me. You have to
3 invalidate the test call and then issue scores consistently
4 with that, then the agency would go about and do that, and it
5 would do that quickly.

6 If the Court concludes that the rationale offered
7 by the agency, however, is insufficient, that is something
8 that just needs to be remanded back to the agency for the
9 agency to provide a sufficient rationale.

10 And under those circumstances, I would suspect that
11 the agency would come back with the same rationale but with
12 more of an explanation, given the time. And it would still
13 likely have the same result, that it would believe that the
14 call was not -- the call was not completed and does not meet
15 the criteria for being invalidated.

16 THE COURT: And what would be the remedy if there
17 were an unlawful delegation?

18 MR. CAMPBELL: Well, Your Honor, Plaintiffs haven't
19 sought anything beyond this case. My strong suspicion is
20 that this would cause serious problems with CMS. Because I
21 know for sure that CMS in the case of hospital reimbursements
22 uses contractors.

23 Now, I believe those are also authorized by
24 statute, so it might -- depending on how the Court resolved
25 it.

1 But the agency as big as CMS is with the task it
2 has been assigned by Congress, necessarily has to do that in
3 certain circumstances just to be able to complete its tests
4 on time --

5 THE COURT: But wouldn't the remedy ordered be
6 similar to the remedy that you just articulated if the agency
7 failed to consider all the arguments; that is, it would be a
8 remand for the agency to reconsider the facts, ignoring the
9 private contractor's recommendation. Right?

10 MR. CAMPBELL: Right. If it is narrowed to say
11 that in this situation CMS was too deferential to the
12 recommendation, you are correct, Your Honor.

13 If it is a situation to say that the agency -- and
14 the Plaintiffs don't argue this, I don't want to put words in
15 their mouth, but if the agency itself can't even hire a
16 third-party contractor to conduct the study, that is a
17 different story. Right? That, obviously, would be -- I
18 think it would be very disruptive to the agency --

19 THE COURT: And your position is that that would be
20 a ministerial task, conducting the actual calls --

21 MR. CAMPBELL: Yes, collecting the data.

22 THE COURT: And collecting the data, yeah.

23 MR. CAMPBELL: Yes, Your Honor.

24 THE COURT: Okay. I think I have your argument.

25 Thank you.

1 I will give Plaintiffs a few more minutes.

2 MR. JORDAN: Thank you, Your Honor. I have four
3 quick points to make in response.

4 The first on the timing. I appreciated my
5 colleague's suggestion that if there is a remand with
6 direction, that CMS would act quickly.

7 We actually think that you could provide that in
8 your decision today -- today and -- or whenever it is issued
9 and not do a remand, but a remand with direction appears to
10 be a point --

11 THE COURT: Okay.

12 MR. JORDAN: -- that my colleague is accepting
13 should you find that there was grounds for that and labeling
14 the call as invalidated.

15 My second point relates to invalidity. There are,
16 in fact, precious few, I believe two scenarios, in which
17 invalidity is even mentioned.

18 One is in the context of the TTY calls for the
19 assistance, and the other -- other circumstance doesn't
20 apply. We actually have in the record the occasions where
21 CMS was invalidating calls for other reasons.

22 So, clearly, it can't be the case or these
23 guidelines would need to be much more lengthy, that this
24 Court could not find that it was appropriate to invalidate a
25 call in these circumstances and on this record where the test

1 caller did not proceed to Phase 3, having completed, as I
2 heard CMS concede today, that the call did, in fact, connect,
3 that it did pass Phase 2, and the test caller did not move to
4 Phase 3.

5 And I just note on this for a moment. Because,
6 again, CMS seems to be injecting a Phase 2A or a Phase 2B
7 where there has to be something said by UnitedHealthcare or
8 the Call Center before moving to Phase 3. That is not what
9 the guidelines say at all.

10 I would also note that in the circumstances -- and
11 we didn't really get into the contractor guidelines, but the
12 contractor guidelines which we have moved to supplement in
13 the administrative record, I would just note at page 42 of
14 those contractor guidelines, provide other instructions for
15 the test caller to do in the event it appears that there is
16 some sort of connectivity issue.

17 And it says: Troubleshooting when the CSR can't
18 hear you.

19 And it says: Check to make sure your phone and
20 headset is not on mute.

21 Check to make sure the headset is not fully plugged
22 in.

23 If this doesn't resolve the issue, continue to say,
24 "Hello, can you hear me," until the CSR can hear you or they
25 end the call.

1 And there are instructions that are provided to the
2 contractor that you are supposed to continue to try to make
3 sure if there is someone on the call.

4 And what we showed in our record, again that we
5 have provided, was that there was not just the connection,
6 but there was a connection with a French-speaking CSR. And
7 then, for whatever reason, all the test caller did was say
8 "hello" and the subjective belief point that CMS continues to
9 make, I do not find that point at least made in that way in
10 the CMS rationale.

11 Rationale No. 1 is on page 231 of the record. It
12 says: The call remain as is.

13 It does use the word "hold" on that, but it says:
14 The interviewer was on hold. They connected with the CSR.
15 Only heard a voice for a second. The interviewer said
16 "hello," not "allo" but "hello. And there was no Response
17 from the CSR. The interviewer continued to hold until the
18 CSR disconnected.

19 It doesn't talk about the subjective belief. It
20 just says they continued to hold.

21 Then -- and, in fact, in our record it would
22 suggest they were not, in fact, on hold.

23 Then there is a back-and-forth related to Elevance.

24 The second rationale that the agency provides is on
25 page 226. It doesn't talk at all about the subjective belief

1 that CMS is trying to proffer.

2 It says that: The call will remain as is. The
3 plan's provided recording confirms the interviewer's
4 experience. They connected to a CSR. Heard someone say
5 something and then cut out. The attached raw data and call
6 log confirms the plan then disconnected after the time went
7 by.

8 And the third rationale, which is page 223 of the
9 record doesn't mention that at all. It says that: The
10 plan's provided recording confirms the interviewer's
11 experience, that they connected to a CSR, heard someone say
12 something, and then cut out.

13 The recording shows a brief noise that the
14 interviewer referenced at the nine-second mark. At no point
15 during provided recording can your plan be heard trying to
16 engage the French-speaking caller.

17 Which, again, is not a requirement in the
18 guidelines.

19 And then: The attached raw data confirms that the
20 plan disconnected.

21 And so the subjective belief of the caller, which
22 was wrong, doesn't appear in the CMS proffered rationale.

23 THE COURT: Do I have to agree that the call was
24 invalidated to find for you in this case, or can I say that
25 there just wasn't -- the guidelines did not allow the agency

1 to rank the call -- rate the call as unsuccessful?

2 MR. JORDAN: You may do -- either of those would be
3 sufficient because it would not be included in -- as
4 a -- well, let me think about the way the math works. My
5 understanding as to how -- the way the math works is it is
6 the number of completed calls over the total number of calls.
7 So it would have to be excluded from the numerator and the
8 denominator.

9 THE COURT: Okay.

10 MR. JORDAN: That is, we are not asking for this
11 call to be included in the numerator. We are asking for it
12 to be excluded from the numerator and denominator.

13 However that works. You don't have to say it
14 was -- find it to be unsuccessful versus -- versus -- or
15 successful, certainly, or invalidated. We would just ask
16 that it not be counted in the numerator or the denominator.

17 The last point on the authority point, at the risk
18 of having done something very quickly during my colleague's
19 argument, we cannot find where there is express authority in
20 the underlying statute for the delegation --

21 THE COURT: Okay.

22 MR. JORDAN: -- which was my belief. But we do not
23 see that. If, of course, the Court wants to have more on
24 that, we can certainly get it, but I did not see it on the
25 quick review during the intervening time.

1 THE COURT: And I assume it is your position that
2 the recommendation made by the private entity goes beyond
3 just a ministerial --

4 MR. JORDAN: Oh, yes, yes, it absolutely does. A
5 ministerial is simply counting. Right? I mean, the
6 definition of a ministerial act is where there was no
7 discretion.

8 The contractor here is exercising all kinds of
9 discretion in making its determination. And, clearly, we
10 know it from the record, the contractor made the choice not
11 to proceed.

12 CMS says, well, the contractor had a belief that he
13 was on hold. All of that is discretion about what to do and
14 when to do it, how to count these things --

15 THE COURT: But that could be ministerial, right,
16 as long as the contractor is just writing everything down,
17 here is what we did, we made the call, we took these steps,
18 and then leave it up to the agency to determine how to rate
19 the call or whether the call is invalidated or unsuccessful
20 or whatever?

21 MR. JORDAN: If the second part was true, it could
22 potentially be ministerial. But what the caller is doing and
23 what the contractor is doing, it is the entity that is
24 looking to make the determination about success, completion.
25 CMS is not doing that. The contractor is making that

1 determination. And that is more than a ministerial action.

2 THE COURT: Okay.

3 Okay. Anything further?

4 MR. JORDAN: No, Your Honor. Thank you.

5 Oh, I'm sorry, if I could just add, and I
6 appreciate my Government colleague's response on this from
7 the timing, we are in the middle of Open Enrollment. One
8 period of Open Enrollment ends on December the 7th.

9 It is important to have these depictions
10 appropriately made for Medicare members choosing a health
11 plan.

12 There is a second Open Enrollment period that opens
13 in the first -- I believe it is the three months starting on
14 January 1 and goes until the end of March. Those are two
15 Open Enrollment periods.

16 So -- and, again, we appreciate Your Honor hearing
17 this case, but time is of the essence for this --

18 THE COURT: I understand. And I appreciate
19 everyone being here. And, obviously, we greatly appreciate
20 the excellent briefing and the argument today. That helps
21 make our job easier.

22 MR. JORDAN: Thank you, Your Honor.

23 THE COURT: Okay. We are adjourned.

24 (Hearing adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/ Shea Sloan
SHEA SLOAN, CSR, RPR
FEDERAL OFFICIAL COURT REPORTER

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